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IN THE

Supreme Court of The United States

OCTOBER TERM, 1969

No. 1533

JULIUS EPSTEIN,
Petitioner,

v.

STANLEY RESOR, Secretary of the Army; DEPARTMENT OF THE ARMY; DEPARTMENT OF DEFENSE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL N. McCLOSKEY, SR.
1250 Hermosa Way
Menlo Park, California

ROGER L. MOSHER
801 Welch Road
Palo Alto, California

Counsel for Petitioner

May 4, 1970

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The petitioner Julius Epstein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 6, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Northern District of California, appears in 296 F. Supp. 214 (N.D. Cal. 1969), and also in Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 6, 1970. No petition for rehearing was filed. This Petition for Certiorari was filed within 90 days of the date the judgment of the Court of Appeals was entered. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. What is the scope of judicial review of the Army's claim to exemption from disclosure requirements of the Freedom of Information Act where exemption is allegedly premised on interests of national defense or foreign policy?

2. Has the Army satisfied its statutory burden respecting permissible withholding of records where it establishes only its own good faith belief in the propriety of its claim to exemption?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5:

Sec. 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

. . . .

(3) Except with respect to the records made available

under paragraphs (1) and (2) of this subsection, each agency on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to the causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

. . . .

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

. . . .

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54.

STATEMENT OF THE CASE

Petitioner, an historian who is currently serving as a research associate at Stanford University's Hoover Institution on War, Revolution and Peace, has filed suit pursuant to Section 3 of the Freedom of Information Act, 5 U.S.C.A. Section 552(a)(3), seeking to enjoin the continued withholding of documents contained in Army file #383.7-14.1 entitled "Forcible Repatriation of Displaced Soviet Citizens —Operation Keelhaul."

Since 1954, petitioner has continually requested permission from the Department of the Army to review the contents of the Operation Keelhaul file in connection with a book he is preparing on the subject of forced repatriation of anti-Communist Russians after World War II. Petitioner's primary area of interest as an historian has concerned war refugees. In 1959, he was appointed by the Eisenhower administration as a member of the White House Conference on Refugees. He has drafted a bill for the creation of a select House Committee to investigate past and present forcible repatriation, and has testified before Congressional Committees on immigration and refugee problems. (Record, pp. 183, 194, 196). Petitioner believes that the file which remains prohibited to him will provide information, not otherwise available, as to approximately 900,000 anti-Communist Russians who were allegedly forcibly repatriated from Germany to the Soviet Union at the end of the World War II, and who are believed to have either died or been executed in slave camps after such repatriation. (Record, p. 183).[1]

The file in question was generated over 20 years ago by Allied Force Headquarters of World War II. On discon-

[1]Reference is to the certified transcript of record in this case, previously transmitted to the Court.

tinuation of that body at the end of the War, a microfilm copy of its records was made for the use of the United States, and the records were then transferred to the Historical Section of the British Cabinet Office in London.[2] The file, originally stored as an historical record with the Army, was finally transferred to the National Archives and Records Service, General Services Administration, "in accordance with normal Department of the Army disposition and retirement procedures." (Record, pp. 186, 188, 23). The Army takes the position, as it has since 1954, that it has the right to prohibit release of this twenty year old file to an American historian who is badly in need of it for the completion of his work on forcible repatriation.

Petitioner's efforts to secure release of the file in question are well documented (Record, pp. 185 through 199), and bear almost audible testimony to the earnestness of petitioner's efforts to secure this information through available channels. The Army's initial refusal, by letter of August 5, 1955, stated that the current high security classification of the documents was required to be maintained indefinitely. (Record, p. 186). After a series of further requests (Record, pp. 187, 190, 192) and a series of vacillating replies (Record, pp. 189, 191, 193) extending over the period from 1955 to 1966, petitioner again requested the Operation Keelhaul file from the Army on July 22, August 14, and September 27, 1967. (Record, p. 194, 196, 198). He was first told that the information was Security Classified and could not be made available for "unofficial research purposes" at the present time. (Record, p. 195). He was subsequently told that the file would be reviewed again "in consultation with the departments and agencies concerned.

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[2]NATIONAL ARCHIVES AND RECORDS SERVICE, GENERAL SERVICES ADMINISTRATION, VOL. II FEDERAL RECORDS OF WORLD WAR II, MILITARY AGENCIES 769 (National Archives Pub. No. 51-8, 1951).

This may take some time." (Record, p. 197). Finally he was informed by Major General Wickham that re-examination of the file had been completed and "the factors that dictated the retention of the Security Classification in 1954 have not changed." Thus, the file could not be reclassified. (Record, p. 199).

On Independence Day, Fourth of July, 1967, the Freedom of Information Act, codified in 5 U.S.C. § 552, became effective.[3] "In February, 1968 [petitioner] again requested release of the file. In response he was advised by the Adjutant-General of the Army that a complete re-examination of the file had been directed; that the 1967 action had been based on the contents of the file in its entirety; that the current review of the file was proceeding on a paper-by-paper basis." (Ninth Circuit's findings of fact. Appendix p. 21).

On March 26, 1968, petitioner filed his complaint (Record, p. 1) seeking an order enjoining the Army from continuing to withhold the file. The Army moved for summary judgment, and Major General Wickham filed an affidavit (Record, pp. 23-27) stating, in essence, that the over-all classification of "top secret" "was required because the file [as originally received] contained many individual TOP SECRET documents of combined or British origin." The affidavit continues that the combined or foreign origin of some of the documents contained in the file necessitates retention of its over-all "top secret" classification. Because the file contains some individual "top secret" documents of British or combined U.S.-British origin, the affidavit asserts that, under Army regulations (Army Reg. 380-6, Record pp. 159-170) this Government cannot declassify or release the file to an American citizen without the permission of the

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[3]The relevant provisions of the Information Act are set out above under the heading "STATUTORY PROVISIONS INVOLVED."

British Government. Major General Wickham's affidavit continues:

> "A current review of the file requested by plaintiff is now in progress on a paper-by-paper basis. This review of individual papers has been completed within the Department of the Army and coordination is now in progress with the Joint Chiefs of Staff and the Department of State to verify the position of the United States Government with respect to each paper. The outcome of this effort will determine the possibility of requesting a review and redetermination of the classification of some or all of the documents by the British government. This Department will continue on its present course of coordinating the declassification of the file with the concerned agencies. The complexity of interests in these files indicates considerable time will pass before a final determination is made." (Record, p. 26.)

The District Court for the Northern District of California granted a summary judgment in favor of the Army. 296 F. Supp. 214 (N.D. Cal. 1969). Although Section 552(a)(3) of the Freedom of Information Act directs that "the court shall determine the matter *de novo* and the burden is on the agency to sustain its action," the District Court held that "this jurisdiction does not apply to information that falls within the exemptions" specified by the statute. (Appendix, p. 28). The Court also held that its jurisdiction was limited to determining whether the Army acted capriciously in asserting its claim for exemption. Referring to General Wickham's affidavit, the nature of the general subject matter of the file, and certain remarks prepared by petitioner in support of a House Resolution quoting the preamble thereof, the District Court concluded that the nature of the information alone renders the circumstances appropriate for the Army's claim of exemption in the interests of national defense and foreign policy. See Appendix hereto at page 34.

On April 17, 1969, petitioner noticed his appeal from the District Court decision. On November 19, 1969, proceedings were had before the United States Court of Appeals for the Ninth Circuit, and on February 6, 1970, the Ninth Circuit entered its judgment affirming the holding of the District Court. The American Civil Liberties Union of Northern California appeared in support of petitioner in the Ninth Circuit as *amicus curiae*.

The Ninth Circuit opinion upholds, in theory only, the statutory provisions for *de novo* review of the conditions of exemption. The court proceeds to distinguish the exemption based on national defense or foreign policy in such a way as to emasculate the Freedom of Information Act. The Ninth Circuit, in essence, holds that the only prerequisite to a claim for such exemption is the Army's own good faith belief that it is entitled to it. The opinion narrows the permissible scope of the court's inquiry, in express contradiction to the language of the Act, to the question of whether the Army's claim for exemption is "arbitrary or capricious". In sum, the Court abdicates its responsibility, under Section 552(a)(3) to determine whether records have been "improperly withheld."

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DIVERGES SHARPLY FROM CONSTITUTIONAL PRINCIPLES OF JUDICIAL REVIEW REGARDING THE EXTENT OF EXECUTIVE AUTONOMY IN MATTERS OF FOREIGN POLICY.

The Army claims exemption from the statutory disclosure requirements of the Freedom of Information Act on the basis of Section 552(b)(1), which exempts from disclosure matters that are "specifically required by Executive Order

to be kept secret in the interest of the national defense or foreign policy."

The issue in this case is the scope of judicial review of the Army's determination that it is entitled to claim such exemption.

The Ninth Circuit gives lip service to the statutory requirement of *de novo* judicial review by holding in principle that "judicial review *de novo* with the burden of proof on the agency should be had as to whether the conditions of exemption in truth exist." See p. 23 of Appendix hereto. The court's subsequent discussion and holding, however, confines the scope of judicial review to the narrow question of whether a claimed exemption is "arbitrary or capricious."[4] See p. 25 of Appendix hereto. The court purports to create its own exemption to the explicit statutory standard of "*de novo*" review by distinguishing the exception provided in the interest of national defense or foreign policy from the other exceptions provided in § 552(b).[5]

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[4]A review standard based on the criteria "arbitrary and capricious" is severely restrictive in scope in comparison with the standard of "*de novo*" determination provided by the Freedom of Information Act. "*De novo*" signifies "anew, afresh; a second time." BLACK'S LAW DICTIONARY 483 (4th ed. 1951). The Supreme Court, in *Fed. Radio Comm'n v. Nelson Bros. B. & M. Co.*, 289 U.S. 266, 276 (1932), found the "capricious and arbitrary" standard to be a "limitation . . . in sharp contrast" with a previous grant of authority which authorized the District Court to receive additional evidence and enter a new judgment based on what it considered just.

[5]The other exemptions are contained in § 522(b)(2)-(9) as follows:

"(b) This section does not apply to matters that are—

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure

(Continued on following page)

It makes this distinction on the ground that "[u]nder the others (with the exception of the third) the very basis for the agency determination—the underlying factual contention—is open to judicial review (Citations). Under (b)(1) [the exemption in question] this is not so." Appendix p. 24. The rationale of the court's distinction—that the factual basis underlying executive determinations in the international realm is foreclosed to judicial scrutiny—conflicts with constitutional principles of judicial review.[6]

The Ninth Circuit opinion proceeds to analyze the Army's claimed exemption according to whether it is "arbitrary or capricious." In so doing it unilaterally formulates a special and restrictive standard of review not contemplated and, in fact, expressly excluded by the applicable statutory language. However, even in applying such special standard the Ninth Circuit's opinion conflicts with accepted constitutional principles respecting the judicial duty and obligation to ascertain whether the executive has exercised its decision-making prerogative in a reasonable manner.[7]

(Note 5 Continued),

of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells."

[6]This Court has established that, although the President's power in the field of international relations is "delicate, plenary and exclusive," it is one "which, of course, *like every other governmental power*, must be exercised in subordination to the applicable provisions of the Constitution." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (Emphasis added).

[7]Because executive action is subject to the constitution, *id.*, the court must determine the reasonableness of such action in order to find that the requirements of due process are satisfied.

In this case the Ninth Circuit appears to have charted a different course for the court because of the Army's claim that considerations of national defense and foreign policy apply. The Ninth Circuit agreed with the District Court that the Army's claim to exemption was neither arbitrary nor capricious, based upon the Army's showing. In so holding it was satisfied "that judicial inquiry into this narrow area does not, at least in this case, warrant *in camera* examination of the file." Appendix p. 25. Thus the Ninth Circuit relied, as did the District Court in reaching its decision, on the Army's own conclusion that it is entitled to the exemption for secrecy in the interest of national defense or foreign policy.

The circumstances of the instant case are not comparable to those existing in other cases in which courts have shielded the executive from disclosure without requiring substantiation of the privilege. Where courts have not seen fit to examine the factual basis asserted for an executive exemption, the urgency of surrounding circumstances has obviated the need for such an inquiry by disclosing the existence of some reasonable basis for the executive claim.[8] The Supreme Court, in *United States v. Reynolds,* 345 U.S. 1 (1953) affirmed its obligation to

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[8]*See United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936) (involving a charge of conspiracy to sell arms of war to a belligerent in violation of a Joint Resolution of Congress and a presidential proclamation); *Chicago & S. Air Lines v. Waterman S.S. Corp.* 333 U.S. 103 (1948) (involving the operation of air routes in overseas and foreign transportation) in which the Court stated:

> "That aerial navigation routes and bases should be prudently correlated with facilities and plans for our own national defenses and raise new problems in conduct of foreign relations, is a fact of common knowledge" (at p. 108);

and *United States v. Reynolds,* 345 U.S. 1 (1953) (involving newly developed secret Air Force electronic devices and a "time of vigorous preparation for national defense").

determine the reasonableness of a claim of privilege,[9] and was able to fulfill that obligation without examining the document in question because of the overly sensitive and threatening nature of the surrounding circumstances.[10] In the instant case, however, there are no such apparent or demonstrated circumstances on which the Ninth Circuit could premise its finding of reasonableness.[11] Moreover, that court actually recognized that existing circumstances suggest a contrary finding in conceding that "the passage of time may cast doubt on the continuing need for secrecy. . . ." (Appendix p. 25). Notwithstanding such doubts and the absence of any evidence or affirmative showing of jeopardy, or even consequence to the national defense or foreign policy, the court found that the Army, by its claim

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[9]Mr. Chief Justice Vinson emphasized:

"Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. . . . It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate. . . ." (at pp. 9-10).

[10]The Court noted "In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense." 345 U.S. at 10.

[11]It is now fifteen years after release of the papers concerning the Yalta Conference, treating among other sensitive subjects, the repatriation of Soviet nationals. See Dept. of State Public. 6199, FOREIGN RELATIONS OF THE UNITED STATES, THE CONFERENCES AT MALTA AND YALTA *1945* (1955). In addition, the four documents that were declassified after twenty years of secrecy reveal no basis for the Army's continued withholding of others. Their nature, in fact, provides strong basis for questioning the Army's reasonableness in withholding them so long. These documents consist of (1) a request for interpreters, (2) a request for authorization concerning immigration of Soviet citizens not encompassed by the forcible repatriation provisions of the Yalta Agreement, (3) a message confirming the defeat of proposals to submit names of prospective immigrants to countries of origin, and (4) a letter describing the form of certificate to be issued to individuals found to be non-Soviets. (Items number (2) and (3) were originally classified only as secret.)

to exemption alone had made "more than a sufficient showing." (Appendix p. 25).

The question is whether a reviewing court can properly discharge its responsibility under the Information Act to determine whether material has been "improperly withheld" by relying solely on the unsupported claims of the agency which seeks to avoid disclosure. Even in terms of its own specially-invoked standard of "arbitrary or capricious," the Ninth Circuit's holding conflicts with the constitutional standard of judicial review; the holding represents a rejection of the court's responsibility to require a reasonable basis for executive action. "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law." *Federal Radio Comm'n. v. Nelson Bros., B. & M. Co.*, 289 U.S. 266, 277 (1932). The unique standard of judicial deference thus fabricated threatens the careful delineation on which the doctrine of separation of powers is premised and subverts the clear intent of a statute which expressly provides for *de novo* judicial review in cases where information is withheld. For these reasons petitioner requests that certiorari be granted to review the judgment below.

2. THE DECISION BELOW PRESENTS AN IMPORTANT FIRST IMPRESSION ISSUE OF STATUTORY CONSTRUCTION BY SEVERELY CONSTRICTING THE PUBLIC'S RIGHT TO OBTAIN INFORMATION UNDER THE FREEDOM OF INFORMATION ACT.

"In exercising the equity jurisdiction conferred by the Freedom of Information Act, the court must weigh the effects of disclosure and nondisclosure according to traditional equity principles and determine the best

course to follow in the given circumstances. The effect on the public is the primary consideration. *Gen. Servs. Administration v. Benson,* 415 F.2d 878, 880 (9th Cir. 1969).

Supreme Court review of the Ninth Circuit's opinion is necessary to enable the public to utilize the Information Act in accordance with legislative intent.[12] Since the effect on the public is the primary concern, courts abdicate their responsibility to the public interest by deferring to an agency, which by refusing to disclose, has already subordinated the public's interest.

The court below deferred entirely to the Army's judgment in this case, without even addressing the following questions as to the Army's authority, under applicable rules, to withhold information.

(1) Does the Act require a specific Presidential determination that requested information be kept secret?

No Executive Order specifically decrees that the Operation Keelhaul file or the contents thereof be kept secret in the interests of national defense or foreign policy. The Army, rather, premises its claim to exemption on the asserted authority of an Army official to conclude that secrecy in a particular instance is required under the terms of an Executive Order which generally provides for classi-

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[12]"It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure. . . ." S. REP. NO. 813, 89th Cong., 1st Sess. (1965). Professor Davis, referring to the differences between the Senate and House committee reports (H.R. REP. NO. 1497, 89th Cong., 2d Sess.) states:

"In general, the Senate committee is relatively faithful to the words of the Act, and the House committee ambitiously undertakes to change the meaning that appears in the Act's words. The main thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of nondisclosure. The *Attorney General's Memorandum* consistently relies on such remarks by the House committee." Davis, *The Information Act: A Preliminary Analysis,* 34 U. CHI. L. REV. 761, 763 (1967).

fication of certain documents.[13] Thus the instant case raises the question of the extent of agency prerogatives in classifying materials when direct Presidential sanction is wholly lacking.[14]

Major General Wickham, who signed the affidavit asserting exemption from disclosure is neither the head of the Department of the Army nor of the Department of Defense. Thus, the case also raises the issue of whether the official claiming the exemption may be someone other than the political head of the department having control over the matter, as required by *United States v. Reynolds*, 345 U.S.1, 7-8 (1953) and the case cited therein.

These companion questions relating to the degree of deference which a court should properly accord a claim of exemption will remain unanswered and troublesome in future cases unless this Court undertakes to resolve them.

(2) Does information generated by Allied Force Headquarters derive from an "international organization"?

The Army asserts that Allied Force Headquarters is an "international organization" within the meaning of Execu-

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[13]Exec. Order No. 10,501 as amended, 3 C.F.R. 979, 50 U.S.C.A. § 401 (1970 Supp.) (1953), Record, pp. 67-85.

[14]The statutory burden of showing the necessity of a secrecy classification is more easily discharged where Presidential expertize is invoked as supportive of such classifications, even indirectly. The degree of Presidential involvement in decision-making is directly related to the court's willingness to defer. *(See, e.g., Chicago & S. Air Lines v. Watermann S.S. Corp.*, 333 U.S. 103, 109 (1948) in which the Court refused to overturn a Civil Aeronautics Board order denying the right to one applicant to operate foreign overseas air routes, emphasizing that, with respect to such applications, "Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies".

tive Order 10501.[15] With respect to information originated by "international organizations," sections 3(e) and 4(a) of such order provide a means of circumventing the stringent standards governing top secret classifications[16] by requiring, respectively, as protective a classification by the United States as that required by the originating entity, and excluding such material from automatic downgrading or declassification. The Ninth Circuit accepted the Army's assertion on this point without discussion, and this significant question of statutory construction deserves this Court's attention.

(3) The most far-reaching and crucial question in terms of the efficacy of the Freedom of Information Act in accomplishing its avowed purpose[17] is whether a United States

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[15]22 U.S.C.A. § 288 provides a definition of "international organization" as "a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress . . . and which shall have been designated by the President by appropriate Executive order. . . ." Allied Forces Headquarters does not fall within this definition of "international organization," and there has been no Presidential designation.

[16]*See*, Exec. Order No. 10,501 §§ 3(e), 4(a) as amended, Record, pp. 69, 82. Section 1(a) of such order otherwise provides:

"Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense."

[17]"An exploration of the legislative history behind this enactment reveals that the premier purpose of the Act was to elucidate the availability of Government records and actions to the American citizen. In addition, Congress sought to eliminate much of the vagueness of the old law (citation)." *American Mail Line, Ltd. v. Gulick*, 411 F2d 696, 699 (D.C.Cir. 1969).

agency can deny access to information by asserting a foreign privilege. The Army maintains that British permission is a necessary precondition to divulgence of the requested file.[18] The basis of the Army's assertion is Army Regulation 380-6, paragraph 4(b), providing that records of combined or foreign origin "are not subject to unilateral regrading action by the United States." (Major General Wickham's Affidavit, Record p. 74). Under the Army's construction of its regulations, disclosure requirements can be effectively thwarted by merely "attributing" information to any one of a wide variety of foreign governments or entities.[19]

The Ninth Circuit assumed, without discussing, the validity of requiring a foreign government's approval of disclosure, a requirement which would quickly destroy the force of the Information Act since the Army would hold that such approval must be obtained before the Information Act applies.[20] In effect, such a requirement would subject an American citizen's rights under a U.S. statute to the

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[18]The Army makes this argument with respect to the entire file, notwithstanding the fact that Major General Wickham's affidavit states only that the file contained "many"—not all—individual top secret documents. In addition, it is possible that some of the file's contents are entirely American-originated, since records of "unintegrated United States Staff sections" were transferred to the U.S. FEDERAL RECORDS OF WORLD WAR II, *supra* note 2.

[19]Under Army Regulation 380-6 material

> "Originated by or containing classified information *clearly* attributed to foreign governments or their agencies, or to international organizations and groups, including the Combined Chiefs of Staff"

may be declassified only by the originating entity. Record, p. 147.

[20]Such a construction would clearly conflict with the legislative purpose of "eliminating vagueness", *American Mail Line, Ltd. v. Gulick*, 411 F2d 696, 699 (D.C.Cir. 1969) in that the American citizen can hardly be expected to have a very clear understanding of foreign laws relating to information disclosure.

sovereignty of a foreign power, regardless of the reasonableness of requiring a foreign government's approval under the circumstances of each individual case. Thus an American citizen's rights may be effectively defeated by a requirement that, in any given case, lacks a reasonable basis for its imposition. There may be no rational ground for requiring another government's approval, as in this case where no showing has been made of any British restrictions currently in force, on any basis for British objection to disclosure.[21]

The Ninth Circuit's approach, if followed, would unreasonably render rights conferred by the Information Act subject to recognition by a foreign government which has no rational interest in preventing disclosure. The resulting anomaly between the Act's legislative purpose and such restrictive implementation is apparent. Because the Information Act was designed to apply the democratic conviction in the free market place of ideas and an open society to the individual citizen, its application is of immediate significance to the nation as a whole. It is imperative that this Court examine and resolve the varying statutory interpretations in order that the purpose which the Act was intended to achieve may be ascertained and realized.

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[21]Even at the end of the war the British apparently considered the file to be of only historical significance since, when transferred to Britain, it was relegated to the Historical Section of the British Cabinet Office, FEDERAL RECORDS OF WORLD WAR II, *supra* note 2. The Army's claim of British privilege is especially incongruous in view of the fact that it transferred the file to the National Archives, reserving only the right to rule on requests for disclosure. Major General Wickham's Affidavit, Record, pp. 73, 74.

Conclusion

For these reasons, Petitioner requests that certiorari be granted to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

PAUL N. MCCLOSKEY, SR.
1250 Hermosa Way
Menlo Park, California

ROGER L. MOSHER
801 Welch Road
Palo Alto, California

Counsel for Petitioner

May 4, 1970

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULIUS EPSTEIN, *Plaintiff-Appellant,* v. STANLEY RESOR, Secretary of the Army, DEPARTMENT OF THE ARMY; DEPARTMENT OF DEFENSE, *Defendants-Appellees.*	No. 24,275

[February 6, 1970]

On Appeal from the United States District Court for the Northern District of California

Before: MERRILL, KOELSCH and HUFSTEDLER, Circuit Judges

MERRILL, Circuit Judge:

This suit was brought pursuant to the Freedom of Information Act, 5 U.S.C. §552(a)(3)[1] to enjoin appellee, as Secretary of the Army, from continuing to withhold from appellant documents contained in an Army file.

[1] "* * * [E]ach agency, on request for identifiable records made in accordance with published rules * * * shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action." For a discussion of the Act, *see* Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi.L.Rev. 761 (1967).

Appellant, a historian, is research associate at Stanford University's Hoover Institution on War, Revolution and Peace. His special interest concerns war refugees. He is preparing a book on the forced repatriation of anti-Communist Russians following World War II, and for this purpose desires to examine the Army file designated "Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul."

This file was generated over twenty years ago by the Allied Force Headquarters of World War II. That agency had classified the entire file as top secret. At the close of the war, the British Government received the original and the United States Department of the Army received a photoprint copy. The file contains a number of individual documents, some of which are of British or combined United States-British origin. Upon its receipt the Army maintained the top secret classification under Executive Order 10501 and it has not yet been declassified.

After storage as a historical record with the Army the file was finally stored with the National Archives and Records Service, General Services Administration. The classification of the file was reviewed by the Army in 1954 and the classification was retained. In 1967 appellant sought declassification. The file again was reviewed and again the classification was retained.

In February, 1968, appellant again requested release of the file. In response he was advised by the Adjutant-General of the Army that a complete re-examination of the file had been directed; that the 1967 action had been based on the contents of the file in its entirety; that the current review of the file was proceeding on a paper-by-paper basis. In March, 1968, this action was brought.

Appellees sought summary judgment. In support of their motion they filed an affidavit of the Adjutant General. That

affidavit, under date of May 29, 1968, stated that the paper-by-paper review of the file was still in progress. It went on:

> "This review of individual papers has been completed with the Department of the Army and coordination is now in progress with the Joint Chiefs of Staff and the Department of State to verify the position of the United States Government with respect to each paper. The outcome of this effort will determine the possibility of requesting a review and redetermination of the classification of some or all of the documents by the British Government. This Department will continue on its present course of coordinating the declassification of the files with the concerned agencies. The complexity of interests in these files indicates considerable time will pass before a final determination is made. In the meantime, the documents remain classified TOP SECRET • • •."

The District Court granted summary judgment in favor of appellees. 296 F.Supp. 214 (N.D.Cal. 1969). The American Civil Liberties Union of Northern California, as amicus curiae, appears in support of appellant.

The appeal presents a question as to the scope of judicial review. Section 552(a)(3) provides that "the court shall determine the matter de novo and the burden is on the agency to sustain its action."

Appellees insist, however, that this subsection does not apply here. They point to § 552(b) which states that "[t]his section does not apply to matters" in nine enumerated categories.[2] Appellees contend that agency determination

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[2]"(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(Continued on following page)

that the material sought falls within one of the nine exempted categories takes the case out of subsection (a)(3) and precludes the broad judicial review provided by that subsection. They assert that we are here faced with an agency determination that the (b)(1) exemption applies.

Unquestionably the Act is awkwardly drawn. However, in view of the legislative purpose to make it easier for private citizens to secure Government information, it seems most unlikely that it was intended to foreclose an (a)(3) judicial review of the circumstances of exemption. Rather it would seem that (b) was intended to specify the bases for withholding under (a)(3) and that judicial review de novo with the burden of proof on the agency should be had as to whether the conditions of exemption in truth exist. *See American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 702 (D.C.Cir. 1969). The District Court was, then, in error in holding to the contrary, 296 F.Supp. at 217.

This being so, appellant argues, the District Court should have taken the file for a determination *in camera* as to whether, under (b)(1) and the applicable executive standards, this file should, after twenty-four years, still be classified as "top secret" in the interests of the national defense or foreign policy.

(Note 2 continued)

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells."

Here we part company with appellant.

Section (b)(1) is couched in terms significantly different from the other exemptions. Under the others (with the exception of the third) the very basis for the agency determination—the underlying factual contention—is open to judicial review. *See General Services Administration v. Benson*, 415 F.2d 878 (9th Cir. 1969); *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 702 (D.C.Cir. 1969). Under (b)(1) this is not so. The function of determining whether secrecy is required in the national interest is expressly assigned to the executive. The judicial inquiry is limited to the question whether an appropriate executive order has been made as to the material in question.

This is not inconsistent with the legislative purpose. It simply recognizes the proposition that the question of what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with. As has been stated, the judiciary has neither the "aptitude, facilities, nor responsibility" to review these essentially political decisions. *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320-22 (1936).

Upon the narrow question remaining for judicial review, we note that the executive determination of top secret classification does not rest on an ancient order unrelated to the conditions of today. The classification has been updated and the process of current review is continuing. Nor is the agency hiding material under a filing system that gives top-secret classification to material simply because it relates, for filing purposes, to other material that is truly top secret. A paper-by-paper review was in operation in May, 1968. Nor do we find a foot-dragging passing of responsibility for ordering declassification to other departments or

nations. The Army has reached a decision and is seeking verification by the Joint Chiefs of Staff and the Department of State. Intercession with the British Government would, we are assured, follow a favorable decision by the agencies of the United States.

The District Court ruled that under (b)(1) it had authority to determine whether classification was arbitrary or capricious. It held that upon appellees' showing, classification could not be so characterized. In both respects we agree with the court's rulings. Further we agree that judicial inquiry into this narrow area does not, at least in this case, warrant *in camera* examination of the file.

The origin of the file's contents itself is sufficient to dispel any suggestion that the original classification was arbitrary or capricious. While the passage of time may cast doubt on the continuing need for secrecy, appellees have made more than a sufficient showing that questions bearing on that need persist and require resolution by the executive.

We conclude that subsection (b)(1) has been shown by the Army to apply and to justify withholding the material in question.

Judgment affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULIUS EPSTEIN,
Plaintiff,

v.

STANLEY RESOR, Secretary of the Army, DEPARTMENT OF THE ARMY, DEPARTMENT OF DEFENSE.
Defendants.

No. 48962

MEMORANDUM AND ORDER

Plaintiff, an historian who is now a research associate at Stanford University's Hoover Institution on War, Revolution and Peace, brings this action pursuant to Section 3 of the Administrative Procedure Act, 5 U.S.C. §552, to enjoin the Secretary of the Army from withholding a file described as "Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul." The file was generated by the Allied Force Headquarters of World War II and has been classified Top Secret since 1948. The classification was made pursuant to the provisions of Executive Order 10501, 3 C.F.R. 484, (Supp. 1968).

Subsection (a) of Section 3 of the Administrative Procedure Act provides in part:

> "[E]ach agency, on request for identifiable records... shall make the records promptly available to any person. On complaint, the District Court of the United States . . . has jurisdiction to enjoin the agency from withholding any records and to order the production of any agency records improperly held . . . In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action . . ."

Subsection (b) of Section 3 provides:

> "This section does not apply to matters that are—
> "(1) specifically required by Executive Order to be

> kept secret in the interest of the national defense or foreign policy; . . ."

The defendants have moved to dismiss the action for lack of jurisdiction of the subject matter, or, in the alternative, for summary judgment. Plaintiff contends that the Top Secret classification on the file he seeks, is unwarranted and that this Court has the power to hold a trial de novo on the merits of this classification. He contends that such power is based on Section 3 of the Administrative Procedure Act. The Court is of the opinion that Congress did not intend to subject such classifications to judicial scrutiny to that extent.

Before discussing the purpose and effect of Section 3 of the Act, the Court directs its attention to the affidavit of Congressman John E. Moss, which plaintiff filed in support of his contentions. The affidavit has been introduced to give aid to the Court in interpreting the provisions of Section 3 of the Act. Congressman Moss' affidavit states:

> "[S]pecifically, it was my intent as the principal co-author of the legislation to grant to the appropriate District Court the broadest latitude to review all agency acts in this regard, including the correctness of a designation by an agency bringing documents within an exemption found in Section '(e)' of the Act; and that the powers granted to the Court and the burdens placed upon the Government in Section '(c)' were meant to include rather than exclude the exemption."

Statements made by legislators in debate can be a part of the legislative history which guides courts in statutory construction. See *Bindczyck v. Finucane,* 342 U.S. 76 (1951). On the other hand, statements made by a legislator after enactment of a statute and not a part of the records of the legislative body are entitled to little or no weight at all. *National School of Aeronautics v. U.S.,* 142 F. Supp. 933 (Ct. Cl. 1956). See also, *United States v. United Mine Work-*

ers of America, 330 U. S. 258 (1947). Such statements are not offered by way of committee report and are not offered for response by other members of the law-making body. The intent which is helpful in interpreting a statute, is the intent of the legislature and not of one of its members. For purposes of statutory construction, a legislative body can only speak through a statute, with the words that are used in light of the circumstances surrounding its enactment. For this reason, the Court has not considered the affidavit prepared and submitted by the Honorable John E. Moss solely for purposes of this lawsuit after the legislation in question was enacted.

Prior to amendment of Section 3 of the Act in 1966, this Section was described by Senator Long as:

> ". . . full of loopholes which allow agencies to deny legitimate information to the public. Enumerable times it appears that information is withheld only to cover embarrassing mistakes or irregularities. . . ." Senate Rep. No. 813, 89th Cong. 1st Sess., 111 Cong. Rec. 26821 (1965).

Senator Long went on to say in support of the amendment:

> "It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. . . ." *Id.* at 26821.

This purpose of full disclosure was accomplished by giving the United States District Courts jurisdiction to determine de novo whether information was being properly withheld with the burden of the withholding agency to sustain its action. 5 U.S.C. § 552(a)(3). This jurisdiction does not apply to information that falls within the exemptions set forth in subsection (b) of Section 3. To hold that the agencies have the burden of proving their action proper

even in areas covered by the exemptions, would render the exemption provision meaningless. If a determination de novo is made by this Court on whether the Top Secret classification by the Department of Army is proper, with the burden on the Secretary to sustain its action, the Court would be giving identical treatment to information withheld by an agency whether it fell within the exemption or not. Apparently, Congress did not intend such a result.

It may be argued that the exceptions enumerated in Section 3 are set forth merely to designate the various grounds on which information may be withheld and that the burden is on the agency to show that the information properly falls within the exception, with the district court having jurisdiction to make the determination de novo. That this position is unwarranted is shown by the clear expression of Congress in Subsection (b) of Section 3, "This section *does not apply* to matters that are [listed below.]" It is further shown by the statements of Congressman Gallagher on the floor of the House:

> "There has been some speculation that in strengthening the right of access to Government information, the bill, as drafted, may inadvertently permit the disclosure of certain types of information now kept secret by Executive order in the interest of national security.
>
> "Such speculation is without foundation. The committee, throughout its extensive hearings on the legislation and in its subsequent report, has made it crystal clear that the bill in no way affects categories of information which the President—as stated in the committee report—has determined must be classified to protect the national defense or to advance foreign policy. These areas of information most generally are classified under Executive Order No. 10501." 112 Cong. Rec. 13659 (June 20, 1966).

On the other hand, it is equally without merit to say that Congress intended absolutely no effect by the Act on infor-

mation that falls within the areas covered by the exemptions. The district courts at least have jurisdiction to determine whether the exemption applies in a given situation. In furtherance of this jurisdiction, it is reasonable to say that Congress intended the courts to determine whether classifications within the first exemption is clearly arbitrary and unsupportable. Otherwise, the agencies could easily frustrate the purpose of full disclosure intended by Congress merely by labeling the information to fall within the exemption.

In determining when information need not be disclosed if *classified* "top secret in the interest of national defense or foreign policy," guidance is set forth in the Act itself. Section 3 provides that the section does not apply to matters that are *"specifically required* by Executive order to be kept secret in the interest of the national defense or foreign policy." The Secretary of the Army has asserted the privilege of nondisclosure pursuant to Executive Order No. 10501 which reads in part:

> "Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret Classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense." Exec. Order 10501, §1(a).

Section 2 of the Executive Order further provides:

> "In the [Department of the Army] the authority for original classification of information or material under

this order may be exercised by the head of the department, agency, or governmental unit concerned or by such responsible officers or employees as he, or his representative may designate for that purpose."

By this Executive Order, the President has delegated authority to the Department of Army to classify matters Top Secret. The exercise of this authority is, as it must be, discretionary in nature. Judgment in this area is best rendered by those best equipped with the necessary facilities to do so. The function of this Court is similar to that described in *United States v. Reynolds,* 345 U.S. 1 (1953), by Mr. Chief Justice Vinson:

"The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect . . . . Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.* at p. 8-10.

The *Reynolds* case was decided before the amendment to Section 3 of the Administrative Procedure Act was adopted and dealt with information being sought by discovery procedures. There is no reason for denying application of the principles announced in *Reynolds* to this case. Pro-

fessor Davis seems to accept this viewpoint in his discussion of the first exemption in Section 3 of the Act:

> "The Department of Justice as recently as 1965 took an official position that in withholding information 'the Executive is accountable only to the electorate. Under the separation of powers concept, Congress cannot transfer responsibility for Executive records to the courts.' That position seems to me extreme, just as is the opposite position that the courts may take the whole power away from the executive would be extreme; the long-term constitutional solution is likely to follow the middle position of the *Reynolds* case that the executive determines the scope of the privilege, subject to a judicial check whenever a court has jurisdiction." Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 764-5 (1967).

It is the opinion of this Court that Congress has granted it jurisdiction to determine whether the first exemption of Section 3 applies in this case. Plaintiff admits that the information he seeks has been *classified* Top Secret by the Department of the Army. The question remaining is whether or not this information is "required by Executive order to be kept secret in the interest of the national defense or foreign policy." In answering this question, the Court is limited to determining whether the Secretary of the Army has acted capriciously in exercising the authority granted to him by Executive Order 10501.

Although the information before the Court is not extensive, it is sufficient for rendering a decision on the issue of summary judgment. The ultimate facts are practically uncontested. The affidavit produced by Major General K. Wickham states that the documents in question are photographic reproductions made from microfilm copies of records generated by the Allied Force Headquarters which directed the allied military operations in the Mediterranean Theater of Operations. It further states that by

direction of the Combined Chiefs of Staff, the original records were released to the United States Government. Top secret classification "was required because the files contained many individual top secret documents of combined or British origin." Plaintiff, in his brief, states that the file is believed to contain information dealing with about 900,000 anti-Communist Russians who were forcibly repatriated from Germany to the Soviet Union at the end of the Second World War, and were either executed or died in slave camps after their repatriation.

The general subject matter of the file in question is described in the preamble to House Resolution 24, 86th Congress, 1st Sess. (1959). Plaintiff has appended to his brief a daily copy of the Congressional Record which describes Congressman Bosch's presentation of the remarks prepared by plaintiff in support of H. R. 24. In these remarks, the plaintiff himself had quoted and used the preamble to H. R. 24 which reads:

> "Whereas this forced repatriation of prisoners of war and civilians cannot be justified by the agreement on prisoners of war, made public by the Department of State on March 8, 1946; and
>
> "Whereas the forced repatriation of prisoners of war who had enlisted in the enemy's army was in contradiction to the opinion of the Judge Advocate General of the Army, as expressed during the last 40 years; and
>
> "Whereas the forced repatriation of millions of anti-Communist prisoners of war and civilians represent an indelible blot on the American tradition of ready asylum for political exiles; and
>
> "Whereas the forced repatriation and annihilation of millions of anti-Communist prisoners of war and civilians of Russian, Ukrainian, Polish, Hungarian, Baltic, and other origin is still poisoning our spiritual relations with the vigorously anti-Communist peoples be-

hind the Iron Curtain, and is therefore impeding our foreign policy . . ." 105 Cong. Rec. A3226 (1959).

The Court concludes that the information above speaks for itself and thus finds that the circumstances are appropriate for the classification made by the Department of the Army in the interest of "the national defense or foreign policy."

Accordingly, the motion to dismiss the complaint is denied, and the motion for summary judgment is granted in favor of the defendants.

Dated: February 19, 1969.

OLIVER J. CARTER
United States District Judge

CECIL F. POOLE
United States Attorney

WILLIAM B. SPOHN
Assistant United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102
Telephone: 556-6430/31
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULIUS EPSTEIN, *Plaintiff,* v. STANLEY RESOR, etc., *Defendant.*	CIVIL No. 48962 FINDINGS, CONCLUSIONS AND JUDGMENT

This action having come regularly before the Court on the alternative motions of the defendant for dismissal for lack of jurisdiction or summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure; and

The motions having been made and argued by the attorneys for the respective parties, and supplemental memoranda and affidavits thereafter presented and the motions duly submitted; and

The Court being fully advised in the premises, entered its Memorandum and Order on February 19, 1969 which is hereby incorporated as though fully set forth herein, and pursuant to which the Court hereby *finds* and *concludes* that:

1. The Court has jurisdiction of the action under Title 5, United States Code, Section 552(a)(3); and
2. There is no genuine issue as to any material fact and the defendant is entitled to a judgment as a matter of law.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The motion of the defendant to dismiss the action for lack of jurisdiction is denied; and
2. The alternative motion of the defendant for summary judgment in his favor and against the plaintiff is

granted, and this judgment shall be entered accordingly with costs and disbursement to be taxed by the Clerk in favor of the defendant.

Dated: April 14, 1969

OLIVER J. CARTER
United States District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

JULIUS EPSTEIN,
Petitioner,

vs.

STANLEY RESOR, Secretary of the Army; DEPARTMENT OF THE ARMY; DEPARTMENT OF DEFENSE,
Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Amicus Curiae urges that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on February 6, 1970.

STATEMENT OF AMICUS CURIAE

This brief is submitted with consent of the parties as provided under Rule 42 of the Rules of this

Court. Letters of consent from each party's counsel are on file with the Clerk of this Court.

The American Civil Liberties Union of Northern California is a non-partisan, non-profit organization dedicated solely to the protection and preservation of the individual liberties guaranteed by the Bill of Rights. We have traditionally been especially concerned with the free exercise of opinion and argument upon which the First Amendment and our form of representative democracy are based.

The exercise of opinion and argument so necessary to a free and open society means little if the relevant facts of government are hidden from the people. In recognition of this, Congress enacted the Freedom of Information Act, effective Independence Day, 1967, so that public access to the facts of government could be guaranteed. In that same spirit, because access to information is critical to an enlightened electorate and essential to the exposure of truth in the marketplace of ideas, we submit this brief in the conviction that it will aid this Court in determining the important issues here presented.

REASONS FOR GRANTING THE WRIT

I. THIS CASE AFFORDS AN OPPORTUNITY TO ARTICULATE RULES THAT WILL PREVENT THE FREEDOM OF INFORMATION ACT FROM BEING VITIATED BY INDISCRIMINATE CLAIMS FOR EXEMPTIONS.

INTRODUCTION

"Openness is a natural enemy of arbitrariness, a natural ally in the fight against injustice." Davis,

Discretionary Justice 226, 111-116 (1969). "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Brandeis, Other Peoples Money 62 (1933).

The old Army file in this case, however, has not seen the light of day for over 23 years. Mr. Epstein began requesting it for his historical research in 1954 (R. 185-199; 31-45) and formally requested it several times again in 1967 and 1968. (R. 1-2, 29, 35, 42, 196, 198.) The Army replied that the entire file is top secret and that declassification review will take "considerable time." (R. 26, 40, 197.)[1]

The courts below, however, excused the Army from any "foot-dragging" and, without even looking at the file, concluded that the Army's action was not arbitrary or capricious and hence should be upheld summarily.

The summary judgment for the Army, affirmed on appeal, is wrong: It vitiates the purpose of the Free-

[1]After the trial, the Army released four documents from the file (reproduced as Appendix A in the brief of amicus curiae in the 9th Circuit). These documents are: a request for interpreters; two papers originally classified "secret" only; and one paper originally unclassified. These papers, hidden from view for over 23 years, reflect the Army's judgment, accepted without question by the courts below, of what meets the President's test that "Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or technological developments vital to the national defense." Exec. O. 10501 §1(a)(R.68.) In the Court of Appeals, amicus curiae set out the numerous failures of the Army to comply not only with the Executive Order but also with its own regulations governing classification and declassification of documents. (AC brief pp. 24-49.)

dom of Information Act that "disclosure be the general rule not the exception."[2] It pays lip service only to the de novo test of judicial review required by the statute, 5 U.S.C. §552(a)(3), and substitutes a virtually unenforceable "arbitrary and capricious" test for reviewing claims to the secrecy exemption, §552 (b)(1); this test is not found in the statute and is precluded by it. The judgment defeats the statutory purpose of expeditious disclosure, §552(a)(3), and encourages long delays whenever a department official thinks he can show that "questions bearing on that need [for secrecy] persist and require resolution by the executive." (Slip. Opn. p.5.) It encourages classification and retention of documents as "top secret" in direct disregard of the strict tests of Executive Order 10501 (see f.n. 1, supra). It breathes life in the notion that judges cannot review claims of secrecy because they are "essentially political" (Slip. Opn., p.4) even though this notion has been squarely rejected by this Court, *United States v. Reynolds*, 345 U.S. 1 (1953) and was rejected early in our country's

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[2]Sen. Jud. Comm., Subcomm. on Admin. Pract. & Proc., *The Freedom of Information Act (Ten Months Review)*, p. 3, 90th Cong., 2d Sess. (1968); S.Rep. No. 813, 89th Cong., 1st Sess. (1965); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act ii (1947) quoting President Johnson's statement in signing the bill that "the United States is an open society in which the people's right to know is cherished and guarded." See Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi.L.Rev. 761 (1967); Note, *The Freedom of Information Bill*, 40 Notre Dame Law. 417 (1965) (extensive discussion of bill and related earlier proposals); Note, *Freedom of Information: The Statute and the Regulations*, 56 Georgetown L.J. 18 (1967); Note, *The Information Act: Judicial Enforcement of the Records Provision*, 54 Va.L. Rev. 466 (1968); Note, *The Freedom of Information Act: A Critical Review*, 38 Geo. Wash. L.Rev. 150 (1969).

history by Chief Justice Marshall at the trial of Aaron Burr. *United States v. Burr,* 25 Fed.Cas. 30, 37-38 (No. 14692d); 187, 191-192 (No. 14694) (C.C. Va. 1807). See Berger, *Executive Privilege v. Congressional Inquiry,* 12 U.C.L.A.L.Rev. 1044, 1107-1110 (1965); Hardin, *Executive Privilege in the Federal Courts,* 71 Yale L.J. 879, 899-900 (1962).

Finally, the judgment makes no sense. How can judges decide important questions without having the crucial facts before them? There was no compelling national interest to be served by precluding not only disclosure in court but also review in camera of the old file. A citizen's right to know, a historian's scholarly research, the open disclosure policy of Congress, and the interest, vital to our judicial process, of having an adequate record to review were all sacrificed for a false sense of security.

1. Rules governing exemption claims and judicial review under the Freedom of Information Act should be but have not yet been articulated by this Court.

The judgment below, unless reversed, will encourage indiscriminate claims for exemption and defeat the purpose of the Freedom of Information Act. This Court can prevent such a result by granting the writ, reversing the judgment, and articulating rules governing exemption claims and judicial review under the Freedom of Information Act.

This Court has not articulated such rules. The absence of rules encourages conflict, confusion, and frustration of the statutory purpose of open disclosure. See, *e.g.,* two recent reviews of the lower court

cases which reveal that the agencies and the lower courts have acted too often to uphold secrecy and deny disclosure. Note, *The Freedom of Information Act: A Critical Review,* 38 Geo. Wash.L.Rev. 150 (1969); *The 1966 Freedom of Information Act—Early Judicial Interpretations,* 44 Wash.L.Rev. 641 (1968-69). The exceptions are few and far between. *American Mail Line Ltd. v. Gulick,* 411 F.2d 696 (D.C. Cir. 1969); *General Services Administration v. Benson,* 415 F.2d (9th Cir. 1969) (in camera review).

Three pertinent rules could be articulated, for example, for cases such as this one:

(a) A federal agency that claims that its information must be kept secret in the interest of the national defense or foreign policy must satisfy a federal district court on de novo review that such secrecy is specifically required by Executive Order; the court's responsibility is not limited to determining whether the agency action was "arbitrary" or "capricious". 5 U.S.C. §§552(a)(3), 552(b)(1); S.Rep. No. 813, 89th Cong., 1st Sess. (1965); Exec. O. 10501; *United States v. Reynolds,* 345 U.S. 1 (1953); *American Mail Line v. Gulick,* 411 F.2d 696 (D.C. Cir. 1969).

(b) The Court reviewing the claim for exemption must have an opportunity to examine the document in camera unless a compelling national interest would be imperiled by even such limited disclosure. *United States v. Reynolds,* 345 U.S. 1 (1953); *General Services Administration v. Benson,* 415 F.2d 878 (9th Cir. 1969). If we are concerned, as we must be, and as the court was in the *Reynolds* case, and as Congress was

in passing the Freedom of Information Act, "that executive caprice might be substituted for honest judgment, the only way for the court to probe the claim of privilege is to take a look at the information in question. . . . In the last analysis, if the court does not examine the information to weigh need for disclosure against the public interest in secrecy, the executive determines the question of privilege." Hardin, *Executive Privilege in the Federal Courts,* 71 Yale L.J. 879, 894-895 (1962).

(c) A claim to the secrecy exemption, like a claim of executive privilege, is not to be lightly invoked. There must be a formal claim for it, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. *United States v. Reynolds,* 345 U.S. 1, 7-8 (1953); see point II, *infra.*

The foregoing is simply a suggested formulation. The overriding point is that it is time for this Court to advance the statutory purpose of disclosure by reversing the unjust result in this case and providing guidance to the lower courts and to the agencies so as to clarify this important but confused area of the law.

2. Freedom of information is an increasingly vital check on arbitrary government action.

Without adequate information, arbitrary government action cannot be effectively reviewed. Effective review is aided by the trend "toward enlargement of the class of people who may protest administrative action", *Ass'n of Data Processing Service Organizations, Inc. v. Camp,* 38 L.W. 4193 (1970), but it will

be frustrated if the agencies can effectively deny information to those with standing to protest. "A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And the people who mean to be their own governors, must arm themselves with the power which knowledge gives." Ltr. from James Madison to W. T. Barry, Aug. 4, 1822, in The Complete Madison 337 (Padover ed. 1953).

3. The formulation of guidelines will facilitate judicial review.

It is reasonable to anticipate that agency records and disclosure actions will improve if the agencies have a clear responsibility not to make indiscriminate claims to exemptions under the Freedom of Information Act and to justify the claims they do make before a federal court if they are challenged. Improved agency records and action will reduce the need for judicial review and will facilitate the judicial review that remains necessary.

II. THIS CASE AFFORDS AN OPPORTUNITY TO HARMONIZE THE SECRECY EXEMPTION UNDER THE FREEDOM OF INFORMATION ACT WITH THIS COURT'S RULES ON EXECUTIVE PRIVILEGE

In *United States v. Reynolds*, 345 U.S. 1 (1953), a litigant sought reports concerning experimental electronic equipment on a military airplane that crashed. The government's claim of secrecy under the executive

privilege doctrine was made by a cabinet level officer after a personal review of the file.[3]

The Court in *Reynolds* found that the information was of immediate and current value to the military; that under the facts there involved this could be determined without seeing the report itself; that its disclosure might compromise the nation's defense; and that alternative sources of information were available, namely the surviving crew members, which the government offered to make available. Given that context and the alternative sources of information, in camera review was deemed unnecessary.[4]

The instant case affords an opportunity to harmonize the secrecy exemption under the Freedom of Information Act with the rulings of the *Reynolds* case on executive privilege. These rulings should be applied as minimum standards for claiming the secrecy exemption and reviewing such claims under the Freedom of Information Act.

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[3]"The privilege belongs to the government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." 353 U.S. at 7-8. See also *Machin v. Zuckert*, 316 F.2d 336, 338 (D.C. Cir.) (formal claim of privilege by Secretary of the Air Force), *cert. denied*, 375 U.S. 896 (1963); *Carl Zeiss Stiftung v. V.E.B., Carl Zeiss, Jena*, 40 F.R.D. 318, 323 (D.C.D.C. 1966), *affirmed per curiam* 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967) (affidavit of Attorney General in his capacity as head of the Department of Justice).

[4]See also *United States v. Burr*, 25 Fed. Cas. 187, 191-192 (No. 14694) (C.C. Va. 1807) (Marshall, C.J.); Berger, *Executive Privilege* v. *Congressional Inquiry*, 12 U.C.L.A.L.Rev. 1044, 1107-1110 (1965); Hardin, *Executive Privilege in the Federal Courts*, 71 Yale L.J. 879, 899-900 (1962); L. Jaffe, *Judicial Control of Administrative Action* 363-364 (1965).

Prior to the Freedom of Information Act, disclosure was not required "of information held confidential for good cause found" or matters relating to "any function of the United States requiring secrecy in the public interest," and there was no provision for judicial review of an agency's decision that there was "good cause" or a need for secrecy. Act of June 11, 1946, ch. 324, Section 3, 60 Stat. 238. The Freedom of Information Act was designed to reverse the thrust of the earlier statute which had been construed to authorize widespread withholding of agency records. S.Rep. No. 813, 89th Cong. 1st Sess. 5 (1965). The "secrecy" exemption in particular was changed to "delimit more narrowly the exception and to give it a more precise definition." S.Rep., *supra* at 8. The Act gave standing to ordinary citizens to obtain judicial review of agency nondisclosure no less than the review available to litigants under the *Reynolds* case.

Applying the standards of the *Reynolds* case will fulfill these statutory purposes, clarify the rules for claiming the secrecy exemption, and facilitate judicial review of such claims.

The foregoing analysis can be tested by applying the *Reynolds* standards to the instant case.

In this case the secrecy privilege was claimed by the Adjutant General of the Army. Although he is charged with the authority to release information from the archives (R. 23), he is not the head of the Department of the Army or the Department of Defense. His affidavit does not reflect the personal action of the head of the department affected that is

necessary to obtain the privilege of the secrecy exemption.

On the merits, the same kind of circumstantial review made in *Reynolds,* without examining the documents themselves, perhaps is possible in this case but it leads to the opposite result: It is implausible, for example, that the British will go to war with us if the Operation Keelhaul file is disclosed to a reputable historian; conversely our government is totally dependent upon the British for secrecy because they have the original of the file. If our relations with other nations might be affected, we are at the mercy of Her Majesty's government. It is possible, perhaps, that some nation or nations would be upset to learn what we and others did 20-odd years ago, but not overwhelmingly likely. The Army can scarcely be said to have carried its burden of showing that it is essential that this information be "kept secret in the interest of the national defense or foreign policy." It is ironic indeed that the Freedom of Information Act, which became effective on a day celebrating nearly 200 years of independence from the British, has been interpreted below to uphold the United States Army's notion that British consent to the release of a 23-year old file is required before Congress' purpose of making United States records public can be served.[5]

[5]It bears noting that the Army made no showing that a claim of privilege by a British official would be sustained by a court. See *Crosby v. Pacific S.S. Lines,* 133 P.2d 470, 475 (9th Cir.), *cert. denied,* 319 U.S. 752 (1943) (claim of British official to privilege denied). See also *Conway v. Rimmer,* (1968) All.E.R. 874-H.L., which established the principle of substantial judicial review of claims of executive privilege and effectively overruled *Duncan v. Campbell, Laird & Co., Ltd.* (1942), 1 All.E.R. 587-H.L.

It is remotely possible that the Army could show, by an in camera disclosure to the trial court, that a few documents should be kept secret. Showing the file to the trial judge and having him react to the assertion that our national defense or foreign policy will be compromised will not be a significant breach in the secrecy wall. It is admitted that the file exists, and that the British have the original. The file has only historical value because it has been moved to the National Archives. A careful examination cannot possibly harm the nation's national defense or foreign policy interests and that kind of examination is precisely what Congress wanted when it passed the Freedom of Information Act.[6]

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[6]Presumably, the Army's principal expertise on the implications of disclosing the file would be in the national defense area rather than the foreign policy area. However, the file is very old and the national defense implications, if any, of releasing it seem remote. Presumably, also, the Army's reluctance to release the file does not arise out of any desire to hide error or inefficiency of the Army or an allied component of Allied Force Headquarters (AFHQ) such as the British, for to do so would directly contradict Department of Defense policy that a claim that information is exempt from disclosure under the Freedom of Information Act "in no event" shall be "influenced by the possibility that its release might suggest administrative error or inefficiency or might embarrass a component or an official of that component." 32 C.F.R. Section 286.4(e), reproduced in House Comm. on Gov't Operations, *Freedom of Information Act (Compilation and Analysis of Departmental Regulations)*, p. 46, 90th Cong., 2d Sess. (1968). One would think also that the Army might be glad to release the file to clear away any suggestion that it might have used force or cooperated in the use of force in the repatriation of persons to the Soviet Union. Repatriation by force was not provided for in the Yalta agreements, and official Army history makes clear that Allied policy was to protect "displaced persons from forcible repatriation." Coles & Weinberg, *United States Army in World War II, Civil Affairs: Soldiers Become Governors*, Department of the Army (1964), pp. 582, 648; Dept. of State Public. 6199, *Foreign Relations of the United States, The Conferences at Malta and Yalta 1945*, pp. 985-987

Under the *Reynolds* case and the statute, the courts below failed to discharge their statutory and judicial responsibilities to determine the question of secrecy. If the courts could not reject the Army's claim entirely, they could, at the very least, have required the Army to produce the file for review in camera and independent judicial judgment. *United States v. Reynolds, supra; General Services Administration v. Benson,* 415 F.2d 878 (9th Cir. 1969); *Hardin, Executive Privilege in the Federal Courts,* 71 Yale L.J. 879, 894-895 (1962).

(1955). It would seem unlikely also that the Army desires to protect Soviet Communists from disclosure about their use of force. The Army surely is opposed to Communist aggression. Moreover, a decision to protect Soviet Communists would not seem to be one of national defense. Besides, the story of the Communists' use of force has already been documented in some detail. See, *e.g.,* the four-volume collection, translated from the German, entitled *Documents on the Expulsion of the German Population from Eastern and Central Europe* (Schneider ed., 1960-61); Bouscaren, *International Migrations Since 1945,* pp. 47-66 (1963).

CONCLUSION

A rational determination of the issues in this case is essential to ensure that citizens will have the access to information that the Freedom of Information Act was meant to give and to prevent the Act from being vitiated by indiscriminate claims to secrecy and administrative delay. The petition for a writ of certiorari should be granted and the judgment of the Court of Appeals reversed.

Dated, May 6, 1970.

Respectfully submitted,

PAUL HALVONIK,
CHARLES C. MARSON,
Staff Counsel, American Civil Liberties Union of Northern California,
MICHAEL TRAYNOR,
DONATAS JANUTA,
PREBLE STOLZ,
By MICHAEL TRAYNOR,
Attorneys for Amicus Curiae, American Civil Liberties Union of Northern California.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1533

JULIUS EPSTEIN, PETITIONER

v.

STANLEY RESOR, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-25) is reported at 421 F.2d 930. The opinion of the district court (Pet. App. 26-34) is reported at 296 F. Supp. 214.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1970. The petition for a writ of certiorari was filed on May 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the requested file, which is security-classified pursuant to Executive Orders 10501 and 10964, falls within the exemption in the Freedom of Information Act for matters that are "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy."

STATUTE INVOLVED

In pertinent part, the public information section of the Administrative Procedure Act (the "Freedom of Information Act"), P.L. 90-23, 81 Stat. 54 (5 U.S.C. (Supp. IV) 552 *et seq.*), provides:

> Public information; agency rules, opinions, orders, records, and proceedings.
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. * * *
>
> * * * *
>
> (b) This section does not apply to matters that are—
>
> (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.
>
> * * * *

STATEMENT

1. For a number of years petitioner has been attempting to obtain the disclosure to him of a file which he describes as "Army document: 'Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul,' " File No. 383.7-14.1 (R. 29).[1] Petitioner's requests were denied because of the "current high security classification of the file" (R. 185-193). After Congress enacted the Freedom of Information Act, which became effective on July 4, 1967, petitioner invoked that statute in support of his request for disclosure (R. 35, 46). That request was also denied, on the ground that the requested file is exempt from disclosure under the Act as matter which, under 5 U.S.C. 552(b)(1), is "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy" (R. 24-52).

Petitioner thereafter brought this action in the district court, pursuant to the Freedom of Information Act, to compel the respondents to disclose the requested file to him (R. 1-2). The district court granted a motion for summary judgment and dismissed the action, on the ground that the respondents had appropriately invoked the foregoing exemption (Pet. App. 26-34). The court of appeals affirmed, holding that "[t]he origin of the file's contents itself is sufficient to dispel any suggestion that the original classification was arbitrary or capricious," and that the respondents had "made more than a sufficient showing" that questions bearing on "the continuing

[1] "R." refers to the record in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

need for secrecy * * * persist and require resolution by the executive" (Pet. App. 25).

2. The basis of the security classification of the requested file is set forth in an affidavit of Major General Kenneth G. Wickham, Adjutant General of the Army (R. 23-27). The Allied Force Headquarters ("AFHQ") was the unified inter-allied command (British and American) that planned and supervised ground, air, naval and service operations and military government during World War II in the North African Theatre of Operations and later the Mediterranean Theatre.[2] After AFHQ was discontinued, the Combined Chiefs of Staff[3] directed that AFHQ's original records be transferred to the British Government and that microfilm copies of the records be released to the War Department of the United States Government. The Adjutant General's affidavit states that the file requested by petitioner is part of the foregoing AFHQ records that were released to the United States War Department by the Combined Chiefs of Staff, and that the requested file, as re-

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[2] See *Federal Records of World War II, Vol. II, Military Agencies,* (G.S.A., 1951), pp. 767, 769.

[3] The Combined Chiefs of Staff was established by the President of the United States and the British Prime Minister as a result of a United States-United Kingdom military staff conference held shortly after Pearl Harbor. The Combined Chiefs of Staff, which continued throughout the war, reported to the President and the Prime Minister. It collaborated in the formulation and execution of policies and plans concerning the strategic conduct of the war, the broad program of war requirements, the allocation of munitions resources, and the requirements for overseas transportation for the fighting services of the allied nations. See *Federal Records of World War II, Vol. II, Military Agencies, supra,* pp. 2-3.

ceived by the War Department, was classified as "Top Secret" since it contained many individual "Top Secret" documents of combined (British and American) and British origin. The Adjutant General's affidavit further states that the requested file, in the possession of the United States Government, has continued to be security-classified because of the requirements of Executive Orders 10501 and 10964 (see Pet. App. 22; R. 24, 26-27).[4]

Executive Order 10501, as amended by Executive Order 10964, requires the security classification of, and exempts from automatic downgrading or declassification, certain defined categories of information, including defense "[i]nformation or material originated by foreign governments or international organizations and over which the United States Goverment has no jurisdiction, information or material provided for by statutes such as the Atomic Energy Act, and information or material requiring special handling, such as intelligence and cryptography."[5] Army Regulation 380-6, which implements these executive orders, lists the "Combined Chiefs of Staff" as an example of an international organization which is outside the jurisdiction of the United States (R. 161).[6]

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[4] The file is stored in the National Archives (R. 23). A great number of other classified documents are also stored in the National Archives and its record centers, including documents dating to 1966.

[5] Section 3 of 18 Fed. Reg. 7049, 3 C.F.R. (1949-1953 Comp.) 979; Section 4(a)(1) of 26 Fed. Reg. 8932, 3 C.F.R. (1959-1963 Comp.) 486.

[6] The common understanding that the Combined Chiefs of Staff is an "international" group is also evidenced by Depart-

Executive Orders 10501 and 10964 forbid the disclosure to petitioner of the requested file for two reasons. First, the file was received by the United States Government from the Combined Chiefs of Staff, an "international" organization, as a security-classified "defense" document, and the British Government (the other member of the Combined Chiefs of Staff) has refused to remove the security classification of the file.[7] Second, independently of the international nature of many of the papers in the file,[8] we are informed by the Department of the Army that the file has been security-classified, pursuant to Executive Orders 10501 and 10964, because of considerations of intelligence and cryptography (see Section 4(a)(1) of Executive Order 10501, as amended by Executive Order 10964). It should also be added, as the court of appeals noted (Pet. App. 24-25), that the Department of the Army has reviewed the file continuously, in cooperation with other agencies of the United States Government, in the hope that a procedure could be developed to declassify all, or a portion of, the papers in the file (see R. 24-52, 185-193). To date, how-

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ment of Defense Directive 5200.10, p. 5 (July 26, 1962), and Department of Defense Directive 5200.9, p. 4 (September 27, 1958).

[7] As a result of recent inquiries by the United States Government, the British Government has agreed to change the file's classification from "Top Secret" to "Secret". However, the British Government has refused to remove entirely the security classification (now "Secret") of the file.

[8] As noted below, certain of the papers were originated solely by the United States Government and are subject to disclosure by the United States to the extent that other security considerations (*e.g.*, cryptography and intelligence) are not applicable.

ever, those efforts have yielded only the declassification of four United States-originated items, involving no problems of intelligence or cryptography, which were furnished to petitioner on August 22, 1969.*

ARGUMENT

The Freedom of Information Act expressly exempts from its coverage matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy" (5 U.S.C. 552(b)(1)). The court of appeals was plainly correct in holding that this exemption applies to the file sought by petitioner. The requested file—which pertains to "defense" information—was received by the War Department of the United States Government from the Combined Chiefs of Staff (an "international" organization composed of British and American representatives) as a security-classified document. And, insofar as the file contains papers originated by the British Government (the other member of the Combined Chiefs of Staff), Executive Order 10501, as amended by Executive Order 10964, forbids the disclosure of the file until such time as the British Government agrees to remove the security classification. Certainly, our nation's foreign policy cannot be conducted effectively if it fails to honor its

* The fact that these items (reprinted in Appendix A to the brief of the *amicus curiae* in the court of appeals) were originated solely by the United States Government permitted the United States to disclose them to petitioner once it was determined that United States intelligence and cryptography considerations were not an obstacle to disclosure.

international commitments." Moreover, independently of the international nature of the file, the foregoing executive orders forbid the disclosure of the file because of considerations of intelligence and cryptography.

There is no merit in petitioner's contention (*e.g.*, Pet. 10) that the courts below should have reviewed the correctness of the executive judgment that documents of the type here involved must be kept secret in the interest of the national defense or foreign policy. As the court of appeals noted, under the exemption involved here the "function of determining whether secrecy is required in the national interest is expressly assigned to the executive," and "[t]he judicial inquiry is limited to the question of whether an appropriate executive order has been made as to the material in question" (Pet. App. 24). The correctness of this reading of the Act is confirmed by the express language of the exemption, by its legislative history,[11] and by the settled principle of judicial

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[10] 5 U.S.C. 552(b)(4), another exemption provision, explicitly recognizes the obligation of the United States Government to honor the confidentiality of documents submitted by *private citizens*. *See General Services Administration* v. *Benson*, 415 F.2d 878, 881 (C.A. 9). *A fortiori*, the government must honor its *international* commitments.

[11] See, *e.g.*, H. Rep. No. 1497, 89th Cong., 2d Sess., pp. 9-10; 112 Cong. Rec. 13659 (Rep. Gallagher). Moreover, Representative Moss, Chairman of the House Government Information Subcommittee, stated, during Hearings Before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.*, 89th Cong., 1st Sess., Part 1, March 30, 1965, pp. 14-15, that:

[Footnote continued on page 9]

refusal to review the discretion of the executive in the areas of national defense and foreign relations. See, *e.g.*, *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320-322; *Johnson* v. *Eisentrager*, 339 U.S. 763, 789; *Orloff* v. *Willoughby*, 345 U.S. 83; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-318.

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[11] [Continued]

We do not challenge that right to withhold for the national interest, because we specifically require it by Executive order to be kept secret in the interest of the national defense or foreign policy. *Now, that is very broad.* That means that *any of these documents that are of sufficient significance to the security of this Nation or to the interests of this Nation as it deals with other nations can, by appropriate designation, be excluded from the provisions of this act.*

We recognize that there are going to be certain needs to keep some of this information locked up. And *the Executive order which is applicable in this instance I believe is Executive Order 10501, where the President authorizes the departments and agencies to appropriately classify and lays out the guidelines for classification* * * *.

* * * *

The whole object of the Executive order is to have a category in which you can place and identify this information, so that it is secure.

Now, what hardship is imposed there? What infringement of the Executive right or responsibility is diminished by this provision of the proposed legislation? [Emphasis added.]

Representative Moss also stated during the House hearings that 5 U.S.C. 552(b)(1) "was intended to specifically recognize that Executive order [No. 10501]" (*id.* at 52), and is drafted "in conformity with that Executive order" (*id.* at 105).

Finally, we note that petitioner can derive no comfort from *United States* v. *Reynolds*, 345 U.S. 1. The *Reynolds* case antedated the Freedom of Information Act and concerned instead a formal claim of executive privilege asserted by the government as a defense to discovery in a Tort Claims Act suit. The claim of executive privilege was sustained by this Court, without requiring *in camera* inspection, where there were circumstances "indicating a reasonable possibility that military secrets were involved • • •" (345 U.S. at 10-11). The instant case, however, involves an explicit exemption to the Freedom of Information Act which, Congress made clear, is independent of the doctrine of executive privilege (see note 11, *supra*). Moreover, as the court of appeals correctly concluded, the government in the instant case has appropriately established that the file requested by petitioner falls within the exemption to the Act on which it relied.[12]

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[12] We recognize that, under the Freedom of Information Act, "the burden is on the agency to sustain its action" in denying disclosure (5 U.S.C. 552 (a) (3)). The House Government Operations Committee explained that "[t]he burden of proof is placed upon the agency which is the only party able to justify the withholding. A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action." H. Rep. No. 1497, 89th Cong., 2d Sess., p. 9. The Senate Judiciary Committee similarly explained that the burden of proof provision was added because the individual "will not know the reasons for the agency action." S. Rep. No. 813, 89th Cong., 1st Sess., p. 8. But here the government has explained why the file sought by petitioner falls within 5 U.S.C. 552(b) (1). Moreover, petitioner's claim under the Act is not affected by his status as a historian. Indeed, one of the funda-

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

MORTON HOLLANDER,
LEONARD SCHAITMAN,
Attorneys.

JUNE 1970.

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fental purposes of the Act was to eliminate the test of whether an individual is "properly and directly concerned" (see S. Rep. No. 813, *supra*, pp. 5-6; H. Rep. No. 1497, *supra*, p. 1).

In any event, pursuant to Executive Order 10816 certain kinds of classified documents can be made available for use by scholars; in the instant case, however, a determination was made that, because of the highly sensitive nature of the requested file, no such exception could be made here (see R. 193).

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